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In the Supreme Court of the United States.

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY,
Boston, Massachusetts,
Petitioner,

v.

THE UNITED STATES

MEMORANDUM FOR PETITIONER IN REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

Counsel for petitioner believing themselves, under the rules, entitled to close the written as well as the oral argument, respectfully submit this supplemental memorandum in reply to respondent's "Supplemental Brief."

A.

The Government urges that "he who by his language or conduct leads another to do what he would not otherwise have done" should be estopped. and cites *Dickerson* v. *Colgrove,* 100 U. S. 578. In

the cited case the plaintiff made a definite written promise in unmistakable words, on which the defendant relied in buying property and improving it. But in the case at bar the claim for credit contained no promise and no representation that the taxpayer had any intention of waiving the statute of limitations. And there is no evidence that the Collector or the Commissioner did rely on the claim as extending the statutory period. All the record shows is that the Collector made a practice of postponing collections when claims for credit were filed.[1] But nothing in the record shows that it was his practice to postpone collection *beyond the statutory period,* in those cases. And no attempt was made to show that the taxpayer knew of the Collector's practice, whatever it was.[2]

If there had been any reliance on the claim for credit, the point would have been made below and the record would have shown the reliance. But only after this case got to the Supreme Court did Government counsel evolve the thought that they might be able to spell an estoppel out of something

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1 R. p. 6, finding No. 9.

2 This practice in the Collector's office was established by a Bureau ruling, IT-Mim. 2125 dated May 3, 1919. This ruling has never been published. It is addressed "To Collectors of Internal Revenue." Under Bureau practice it is customary to employ two types of addresses on rulings. The first is of the type mentioned above; the second is, "To Collectors of Internal Revenue and Others Concerned." We request this Court to take judicial notice of the fact that under Bureau practice not only are the rulings of the first type not published but also it is generally understood by Government employees that the contents of such communications are not to be divulged to taxpayers. Cf. dissenting opinion of Judge Littleton in *Naumkeag Steam Cotton Co.* v. *United States,* 2 Fed. Supp. at 145.

they think the Collector *might* have relied on if he had not been relying on something else.

Government counsel[1] cite Williston, *Contracts*, section 692, for the phrase "promissory estoppel", and the rule that the fundamental basis thereof is the justifiableness of the conduct of the party claiming the estoppel. Can the Government justify treating the claim for credit as a basis of estoppel without showing that the taxpayer knew or should have known that the claim might be treated as a waiver and that the Collector or the Commissioner did so treat it?

The Government stops its quotation from Williston a little too short. In the same section, the Professor says:

> "It should be observed, however, that where conduct rather than words is relied on as constituting a false representation, the conduct can hardly be considered such if the party against whom the estoppel is claimed is ignorant of the facts which make his conduct deceptive. His conduct is like the use of ambiguous language in ignorance of the facts which make it ambiguous."

The Government says,[2] "We submit that no policy such as is involved in preventing avoidance of the statute of frauds, bars the assertion of estoppel here." The reason Congress provided a specific method for extending the statutory period of limitation is identical with the reason on which

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1 Supplemental Brief, p. 2.
2 Supplemental Brief, p. 4.

statutes of frauds are based—to prevent claims by taxpayers or the Government that the time for making refunds or the time for making assessments had been extended by oral or implied promise.

While this Court has had occasion, so far as we know, to pass on only one case of estoppel to plead the statute of limitations,[1] there are many state court decisions in point, some of which are cited in the margin, should the Court care to examine them.[2]

Government counsel wander again into the realms of imagination when they say[3] that "The petitioner's entire conduct in the transaction (including its acquiescence in the Commissioner's action) shows, we submit, that it intended this claim to be a basis for a final settlement of its 1917 taxes, one element of which was the acknowledgment that the taxes claimed for that year were due." The claim for credit contained no such ackowledgment —it was filed because the taxpayer received a notice and demand for an asserted deficiency and had no right to enjoin collecton.[3] Instead of paying cash

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1 *Andreae* v. *Redfield*, 98 U. S. 225.

2 *Klass* v. *City of Detroit*, 129 Mich. 35, 88 N. W. 204; *Miller* v. *Ahneman*, 183 Minn. 12. 235 N. W. 622; *Neal* v. *Pickett*, (Tex. Civ. Appeals) 280 S. W. 748; *Monroe* v. *Hurington*, 110 Mo. App. 509, 85 S. W. 1002.

3 Supplemental Brief, p. 4.

4 A cogent answer to this argument by the Government is given in Cooley's Blackstone, Vol. II, p. 306, where in the footnote discussing what sort of an acknowledgment is required to extend the statute of limitations the following case is cited. A says to B that the latter owes him money. B replies, "You owe me more money; I have a set-off against it." Such a statement is not an acknowledgment extending the statute of limitations. 2 B. and A., 759.

(which the Collector might have refused to accept)[1] the taxpayer authorized the Collector to collect the 1917 deficiency out of any over-payment the taxpayer might have made for 1918-1921. This did not constitute a concession of the accuracy of the 1917 computation any more than payment in cash would have constituted such concession—and the taxpayer had to do one or the other under duress of threatened distraint.

And there is nothing in the record to indicate that the taxpayer intended a final settlement of its 1917 tax.[2]

Since the claim for credit did not admit the correctness of the Collector's demand, it cannot constitute an account stated against the taxpayer. It is quite different from the certificate of overassessment by which the Commissioner did admit that the 1918 tax had been overpaid.

B.

The Government says[3] that there is no evidence that the Commissioner "refused" to sign the waiver except "the mere failure to sign promptly."

We submit that when the Commissioner refrained for over seven years from signing the waiver, his action was legally equivalent to refusal.

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1 *Cf. United States* v. *Pacific Midway Oil Co.*, reported in Commerce Clearing House, Federal Tax Service for 1932, at p. 8280.

2 Even if it had such an intent, it would have been ineffective. *Botany Worsted Mills* v. *United States*, 278 U. S. 282.

3 Supplemental Brief, pp. 5-6.

C.

The extremes to which the Government is put, in its effort to find a justification for the judgment below, are exemplified in the last paragraph of its Supplemental Brief. We did not refer to section 281(b) of the Revenue Act of 1924—because it is rendered inapplicable by section 281(f).

Section 281(f) provides:

> "This section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable * * *."

The claim for credit had been duly filed under section 252(a) of the Revenue Act of 1921[1] which allowed five years for filing claims for credit, and the claim for credit of August 9, 1923 had been filed within five years after due date of the 1918 tax return.

Respectfully submitted,

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1 As amended by Act of March 4, 1923, c. 276, 42 Stat. 1504.